(9)

No. 95-719

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE PICTURE AGENCY COUNCIL OF AMERICA, INC. (PACA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

NANCY E. WOLFF
Counsel of Record
CAVALLO & WOLFF
115 East 57th Street, Suite 1220
New York, New York 10022
(212) 753-2224

Attorneys for Amicus Curiae

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT MUST BE REVERSED AND THE DAMAGE AWARD BY THE JURY REINSTATED 7

I. THE JURY'S FINDING OF DAMAGES SHOULD BE UPHELD, AS THE JURY ALONE WITNESSED FIRST HAND THE EVIDENCE DEMONSTRATING THE VALUE OF PETITIONER'S LOST, ORIGINAL IMAGES 7

A. Limitations of the Cold Record 7

B. Elements of Valuing Original Photographic Imagery 8

II. THE VALUE OF $1,500 PER TRANSPARENCY FOR EDITED, PROFESSIONAL PHOTOGRAPHS IS NEITHER UNREASONABLE COMPENSATION NOR SHOCKING 11

A. The Second Circuit Misunderstood The Governing New York Law 11

B. Application Of The Elements of Valuation . . . 13

III. THE SECOND CIRCUIT'S INTERPRETATION OF A "UNIQUE" PHOTOGRAPH BEARS NO RELATION TO THE MEANING OF THAT TERM AS UNDERSTOOD BY MEMBERS OF THE STOCK PHOTOGRAPHY INDUSTRY 17

IV. A BODY OF WORK HAS VALUE GREATER THAN THE VALUE OF INDIVIDUAL TRANSPARENCIES . 20

V. THE WORK OF A PHOTOJOURNALIST IS AS COMMERCIALLY VALUABLE AS THE WORK OF OTHER PROFESSIONAL PHOTOGRAPHERS . . . 22

VI. PAST EARNINGS FROM STOCK SALES IS NOT A RELIABLE INDICATOR OF VALUE 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **PAGE**

Alen MacWeeney, Inc., v. Esquire Associates, 176 A.D.2d 217, 574 N.Y.S.2d 340 (1st Dep't 1991), *leave to appeal dismissed*, 79 N.Y.2d 1015, 584 N.Y.S.2d 437 (1992) 11, 12, 13, 17, 18

Blackman v. Michael Friedman Publishing Group, Inc., 201 A.D.2d 328, 607 N.Y.S.2d 43 (1st Dep't 1994) 12, 13, 17

Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 429 (2d Cir. 1995) 4, 8, 9, 19, 22

Girard Studio Group v Young & Rubicam, 147 A.D.2d 357 (1st Dep't 1989) 11, 12

Hoffman v. Portogallo, Supreme Court, New York County, Index No. 19102/85 (Gabel, J.) . . . . . *passim*

Miller v. Newsweek, 675 F. Supp. 872 (D. Del. 1987) 9

Nierenberg v. Wursteria, Inc., 189 A.D.2d 571, 592 N.Y.S.2d 27 (1st Dep't), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S.2d 581 (1993) 11-12, 13, 17

Rattner v. Geo Magazine, Supreme Court, New York County, Index No. 15762/84 (Shorter, J.), N.Y.L.J. page 39, col. 2, 3/16/87 . . . . . *passim*

STATUTES AND MISCELLANEOUS

17 U.S.C. §302(a) 4, 13

New York Civil Practice Law and Rules, § 5501(c) (McKinney's 1995) 11

Silverman, *For the World to See* (Viking 1984) 19

95-719

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

WILLIAM GASPERINI,

Petitioner,

- against -

THE CENTER FOR HUMANITIES, INC.,

Respondent.

IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

The Picture Agency Council of America, Inc. (PACA) submits this brief *amicus curaie* in support of petitioner, William Gasperini, a professional photojournalist.[1]

Picture Agency Council of America, Inc. is a non-profit trade association incorporated in 1977 and known under its trade name PACA. PACA is comprised of 101 stock picture agencies in North America. Stock agencies maintain in "stock" a library of original photographic imagery which is leased to users, such as book publishers, magazines, newspapers, advertisers, etc. The professional photographer is paid a license fee for reproduction of his or

[1] Consent letters have been filed with the Clerk of this Court.

her work by the publisher, and the stock agency is paid a commission as the photographer's agent.

PACA represents approximately 15,000 professional photographers. PACA's smaller sized members each manage approximately 200,000 images, and PACA's larger members maintain libraries of over 8-10 million images each.

As agents for professional photographers, PACA's members negotiate license fees, and when necessary, protect photographers' interests by bringing claims against third parties for copyright infringement, or money damages when a photographer's images are damaged or lost.

PACA's goal is to develop uniform business practices in the stock photo industry, based upon ethical standards established by the membership. Among its Code of Ethics, signed by every member, is that each stock agency will endeavor to promote policies and practices that serve to elevate the stock picture industry, rigorously maintain the high standards of honesty and fair play with clients, photographers and each other.

This case raises the issue of damages for lost commercial transparencies, and specifically, whether a jury award of $1,500 for each slide was excessive. Because PACA's members have experience with the value of transparencies, and have a stake in the continued reasonable valuation of commercial transparencies, we urge the Court to rule in favor of the Petitioner.

We submit this brief to correct the misperception of the Circuit Court that (i) the value of $1,500 for a commercial transparency represents unreasonable compensation; or (ii) the work of a photojournalist is somehow not as

commercially valuable as that of other professional photographers.

Equally at stake is the strength of our jury system. The average person is unfamiliar with the structure of the photographic industry, or the value of original images. A jury trial enables counsel for a professional photographer to educate the jury about the commercial principles relied on by professional photographers, their agents and users of original images. Thus, when a jury has been presented evidence of value at trial, and returns a verdict, the appellate courts should not sit as a thirteenth juror with veto power and make their own factual findings contradicting the wisdom of the jury.

This situation is ever increasing among jury awards for damages in lost transparency cases. Because PACA members often bring legal action for their photographers, PACA has a profound interest in preserving the members' right to a jury trial when seeking judicial redress for damaged or lost transparencies.

PACA will not burden the court by duplicating information presented by Petitioner. PACA has insight from long experience into the business of photography, and we believe these insights are important for the Court's understanding, in order to place the legal issues in context with industry realities ignored by the Second Circuit.

As there is a dearth of cases dealing with the photo reproduction industry, and the value of images is either not known or understood by those not involved with the purchase of reproduction rights, PACA submits this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

A jury's damage award for the loss of original images belonging to a professional photographer should be given great weight. While admittedly, the value of an irreplaceable photograph is difficult to determine, only the jury can listen to the witnesses, view a photographer's portfolio, view examples of a photographer's work or an agency's collection, and in some cases, actually view reproductions of lost work. A cold record is devoid of much of the essential elements that are necessary to determine the value of visual images.

Nor are the hazards of passion and sympathy at play in valuing property for commercial purposes, as in a personal injury case where the victim has suffered grievous harm. Once they have the relevant evidence, juries have consistently understood the complexities of valuing photographs which are rarely sold, but instead, licensed over the life of the copyright, and consistently have awarded reasonable damages.

Contrary to the Second Circuit's statement, the value of $1,500 for a professional photograph, professionally edited, when analyzed in the context of the stock photography industry, is neither a "windfall" nor a "winning lottery ticket." *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 429 (2d Cir. 1995) This figure has been used by the industry to measure damages since the early 1970's. It was never intended to cover every photograph taken by a professional photographer, but only those that have been edited under the most rigid standards for professional quality and marketability. It fairly represents the average license fee a commercial photograph can earn over the lifetime of the photographer's copyright, i.e., life plus fifty years. 17 U.S.C. § 302(a)

Average license fees range from approximately $175 to $10,000 for a one time use. Thus, $1,500 has always been considered a conservative valuation for a photograph that can be used many times. Obviously, some photographs may never earn any fees, and others will earn well over $1,500. The figure is an average, the best approximation of an income earning asset that is difficult to quantify with mathematical certainty.

The need for one value is important to the industry, both for photographers, agents and users. With large libraries of photographs, it is impossible to value photographs individually. Users also need a sum certain so they know the value and can be apprised of the risk and care required in handling photographs and obtain appropriate insurance if they so desire. The risk of that figure being abused is rarely present because it is not the practice for either agents or photographers to submit anything but the best of a collection to a user.

The Second Circuit erred in relying solely on photography cases which rejected the value of $1,500 for transparencies without distinguishing the facts of those cases. In particular, those cases were inapposite because they did not involve carefully edited images, representing the most select pictures from a body of work created over a period of time.[2] The Second Circuit simply overlooked the more factually relevant New York appellate decision supporting the $1,500 value.

A body of work is necessary to tell the complete story of a subject. The value of a body of photographs is greater

---

[2] In photography parlance, a "select" means the best pictures from a shoot, and therefore, the pictures that are commercially viable. Often, there may be only one select from an entire roll of film.

than the value of its individual images. Appellate courts often are blinded by the amount of damages requested, and fail to recognize the importance of that body of work to the photographer or the stock agency. In contrast, juries usually understand the irreplaceable loss of a commercial body of work with many potential uses over the life of the photographer's copyright.

The Second Circuit, as often happens in these cases, erred in relying too heavily on the past earnings of the photographs as the dominant indicator of value. In many cases, such as this one, the body of work is only recently created and the photographer and/or agency has not had sufficient time to establish an earnings history for these images. Furthermore, it is common practice for many photographers to focus on assignments and develop a large body of work during the early years of their career. Only once they have accumulated a body of work, and most importantly have had the time to edit the entire collection, do they finally submit the edited images to a photo agency to earn money for their later years, and their heirs who hold the copyright.

Courts, like the Second Circuit, continually misapply the term "unique," by looking solely at the subject of the photograph in the broadest context, rather than considering the aesthetic elements of an individual photograph that makes a photograph unique and commercially valuable. Courts frequently ignore the demands of the photography buying market by labeling a photograph unique or generic. Many highly commercial photographs would not be considered "unique" by a court, yet have extreme marketability and earnings potential. Again, having none of the visual elements in the written record severely handicaps an appellate court from making a fair determination.

Lastly, the case at hand also demonstrates the court's lack of understanding about the various types of photographers who are considered professional. The court's perception of a journalist and photojournalist, and the relative value of the work as compared to other photographers, was skewed by artificially separating income earned for words and income earned from images.

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT MUST BE REVERSED AND THE DAMAGE AWARD BY THE JURY REINSTATED

I.

THE JURY'S FINDING OF DAMAGES SHOULD BE UPHELD, AS THE JURY ALONE WITNESSED FIRST HAND THE EVIDENCE DEMONSTRATING THE VALUE OF PETITIONER'S LOST, ORIGINAL IMAGES

A. Limitations of the Cold Record

The present case dramatically illustrated the need for the deference to jury verdicts guaranteed by the Seventh Amendment. The jury saw and heard a great deal of evidence about the loss of irreplaceable photographic images taken by a professional photojournalist. The jury alone, in these cases, is able to listen to and view all the evidence presented by both sides at the trial. The property lost is visual in nature and the evidence necessary to establish value is often not reproducible in a printed record. As aptly noted by Judge Calabresi: "We review the evidence on a cold paper record, and we compare the

record to prior decisions as to which we have incomplete knowledge of the facts". *Gasperini*, 66 F.3d at 431. Despite this lipservice to the severe limitation of the written record, the Second Circuit chose to disregard the determination of the jury and the trial judge, and issued a *de novo* review of the facts, drastically reducing the award or compelling a new trial.

B. Elements of Valuing Original Photographic Imagery

The courts in New York for some time have recognized that valuing transparencies is an abstract process and have enumerated, the following elements that are to be considered in valuing transparencies:

(i) technical excellence;

(ii) the selective eye of the photographer;

(iii) established prestige and earning level of the photographer;

(iv) uniqueness of the subject matter;

(v) established sales or use prices;

(vi) the degree to which each transparency has an osmotic interaction deriving reflective value from the group; and

(vii) the frequency of acceptance by users.

Hoffman v. Portogallo, Supreme Court, New York County, Index No. 19102/85 (Gabel, J.) 6/26/87, citing as authority *Rattner v. Geo Magazine*, Supreme Court, New York

County, Index No.15762/84, (Shorter, J), N.Y.L.J. page 39, col.2, 3/16/87.[3]

Not all the *Rattner/Hoffman* elements will be applicable in all cases. However, courts outside New York also recognize these elements, choosing to incorporate some, or emphasize others, depending on the particulars of the case. *Miller v. Newsweek*, 675 F.Supp 872 (D. Del. 1987) (omitting three of the seven *Rattner/Hoffman* elements.)

The evidence necessary to establish the above elements requires, in addition to the photographer's direct testimony, a substantial amount of visual, demonstrative evidence that cannot be reproduced in a paper record and in this case, was not reviewed by the appellate court. Evidence in most cases includes the photographer's portfolio, consisting of mounted photographs, tear sheets[4] and slides, establishing his or her reputation and acceptance of the images by users. In most instances, exemplars of the photographer's work must be presented as evidence because the transparencies at issue are lost solely by the fault of the defendant.[5] This

---

[3] The Second Circuit correctly states that, in a diversity case, it must predict how the highest court of the state would rule. *Gasperini*, 66 F.3d at 430. The New York Court of Appeals has not ruled in any case involving damage or loss of a professional photographer's work. However, as discussed *infra*, the Second Circuit failed to carefully review New York law on this subject. The *Rattner* and *Hoffman* cases appended hereto were the first to identify the elements for valuing a photographer's lost image. These elements continue to be the source of jury instructions in such cases, including that of petitioner.

[4] I.e., examples of how a photograph was reproduced in a magazine, book or newspaper.

[5] The jury in the present case had the added advantage of viewing a video produced by the respondent containing over 100 of Gasperini's lost

(continued...)

evidence demonstrates the quality of a photographer's work, including his or her selective eye, technical skill and reputation. Although not peculiar to cases involving images, the jury and the trial judge are able to listen and observe all witnesses, including the experts, and determine reliability, credibility, and persuasiveness.

The trend, as in this case, is for appellate court's to second guess the jury, and based on the limited "cold paper record," engage in its own factual review. The Second Circuit's decision is not atypical in finding the photographer's expert witness unpersuasive, or finding it unlikely that the photographer's work would generate future income, or that only certain of the lost or destroyed images were unique, or in assigning significant value to some transparencies, and only nominal value to others.

This independent factual review of a case after a jury trial frustrates the entire purpose of a jury and, in effect, denies photographers and stock agencies a fair trial as guaranteed by the Seventh Amendment. If a jury is presented with sufficient evidence to satisfy the various elements involved to determine damages, and makes an award based on the evidence, the appellate court should not replace its view of the evidence for that of the jury, especially where the trial judge found the award appropriate. Under the American Constitution, the jury system is essential, and remains the backbone of our civil litigation system. PACA members know from experience

---

[5] (...continued)
transparencies, as well as examples of his mounted photographs, and those printed in magazines and newspapers, taken in other countries, all evidencing the quality of his work gneerally, and the value of his body of work, separate from any individual images, and the uniqueness of the subject matter he photographed.

that juries can and should be trusted to do their jobs conscientiously and with fairness.

II.

THE VALUE OF $1,500 PER TRANSPARENCY FOR EDITED, PROFESSIONAL PHOTOGRAPHS IS NEITHER UNREASONABLE COMPENSATION NOR SHOCKING

A. The Second Circuit Misunderstood The Governing New York Law

In reviewing New York law, and discarding the average value of $1,500 for each of petitioner's slides, the Second Circuit ignored the most relevant New York case, *Girard Studio Group v Young & Rubicam*, 147 A.D.2d 357 (1st Dep't 1989). Unlike the cases relied on by the Second Circuit, *Girard* involved the loss of a selection of a photographer's best work over a period of years.[6] The jury awarded the photographer $3,000 per lost image. The Appellate Division exercised it powers to review the record *de novo* and reduced the amount to $1,500 per transparency.[7]

The cases relied on by the Second Circuit, *Alen MacWeeney, Inc. v. Esquire Assocs*. 176 A.D. 2d 217, 574 N.Y.S. 2d 340 (1st Dep't 1991) *leave to appeal dismissed*, 79 N.Y. 2d 1015, 584 N.Y.S. 2d 437 (1992); *Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 592 N.Y.S. 2d 27 (1st

---

[6] Counsel herein was plaintiff's counsel in *Girard* at both trial and appeal, and therefore, is quite familiar with the facts of that case.

[7] *See* New York Civil Practice Law and Rules, § 5501(c) (McKinney's 1995).

Dep't.), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S. 2d 581 (1993) and *Blackman v. Michael Friedman Publishing Group, Inc.*, 201 A.D.2d 328, 607 N.Y.S.2d 43 (1st Dep't 1994) did not concern the value of edited, select photographs from a large body of work taken over a period of time.

In *Girard*, the court reduced the jury award in line with the practice of valuing professionally edited and select transparencies at $1,500. As in petitioner's case, there was no "delivery memo," i.e., written agreement, containing a liquidated damages clause stipulating $1,500 as the value for a lost slide. Nor was there any evidence in *Girard* of past earnings for the plaintiff's slides. The jury was presented evidence of the subject matter, examples of the photographer's reputation and other work demonstrating his abilities, and testimony on the potential uses of the images over the life of the copyright, i.e, the average remaining life of the photographer plus 50 years.

Notably, none of the photographs were taken in situations of great danger, such as petitioner's helicopter shots, treks to remote and sparsely inhabited areas of Central America, or combat scenes. However, the photographer's lost work in *Girard* were primarily action shots which could not be set up in a studio and recreated. *Girard* should be the controlling case when examining irreplaceable photographs which were the selects off a body of work taken over a period of time.

MacWeeney is an exceptional case because it involved the loss of 189 photographs of a model taken in a studio over the course of one afternoon. One hundred and fourteen of the images were of the same pose. The $1,500 figure was not intended to apply to this type of situation, i.e., unedited shots of the same pose, taken in studio

conditions which could be recreated for a re-shoot fee. Even though the photographer was quite successful, it is understandable that this award was reduced. *MacWeeney* is obviously different from cases involving edited, historic, news and action photographs which are not capable of being recreated.

The award in *Nierenberg* was reduced predominantly because the photographer was a film maker with little experience in photography. Moreover, all 134 lost transparencies depicted the various activities of marching bands.

The plaintiff in *Blackman* was an ex-football player who became a sports photographer. The loss consisted of 146 out of over 2,000 generic shots of football games sent to the defendant. The publisher which lost the slides argued that the market was saturated with pictures of this subject matter, and thus, the court focused on the uniqueness of the lost slides and reduced the award.

B. Application Of The Elements of Valuation

The stock industry has long recognized that photographs meeting technical and aesthetic standards have many commercial uses. Each stock agency employs highly trained picture specialists who recognize the important elements of an image which make it marketable. These include things like composition, lighting, focus, and selective point of view of the photographer. In the case of a body of work, picture specialists understand that the relation of each picture to the whole subject matter is critical, as users often request stock agencies to submit many pictures about one subject matter. The courts in *Rattner/Hoffman* recognized this industry practice, and from that, articulated the elements for valuing lost transparencies

relied on by most courts since then. Professional photographers go through the same stringent editing process in choosing selects from a roll.[8]

The industry value of $1,500 was never intended to apply to every photograph taken by a photographer. Only the images that survive a stringent edit and meet both technical and aesthetic standards are to be valued at $1,500.[9]

---

[8] Petitioner carefully edited his body of work taken over a seven year period, selecting only the best 300 slides of more than 5,000 to send to the respondent. That the 300 were selects is evident in that 110 were used in respondent's video, and the balance were retained by the respondent for possible future use in other productions. It is highly unusual that such a large percentage of transparencies are selected by a user, unless they represent the selects of a larger body of work.

[9] Back in the late 1960's, the photographic industry, under the auspices of the American Society of Magazine Photographers ("ASMP"), undertook to establish a fair and equitable value of stock photos. This was done through surveying photographers, agents, advertising agencies and publishers as to the number of times images were sold on average, and the fees paid for the various type of uses. The survey revealed that, on average, a professionally taken and professionally edited image would sell 3 to 8 times over the life of a copyright for fees ranging from $150 to $10,000. It was thus determined that $1,500 per image was a reasonable and conservative value to place on professionally taken and professionally edited photos. The figure first appeared in print in the Guide to Business Practices published in its first edition by ASMP in 1973. It has continued to appear in three subsequent editions plus two editions of the Stock Photography Handbook.

In the intervening years, this figure has been accepted by professional trade associations such as PACA and the American Society of Picture Professionals. Courts and arbitrators have for many years used this $1,500 figure as a benchmark in assessing damages, while determining that some images may be worth more and some worth less. As more than 25 years has lapsed since the initial survey, some individual photographers and photo agencies have increased the stated value of images to $2,000 or $2,500 to reflect current uses, fees and inflationary elements. As a result, some PACA members now demand $2,000 to $2,500.

In examining the $1,500 figure, the Court should be aware of the manner in which photographs are licensed to users. A typical license is for a specific use which covers every imaginable use of an image, i.e., a magazine insert, a book or catalogue cover, textbook illustration, posters, calendars, notecards, direct mail, brochures, national and regional advertising, billboards, CD-ROM, and the new digital uses on the internet and World Wide Web, to name only a few. A fee is negotiated for each type of use. Generally, the longer the duration of use and the greater exposure of an image, the higher the fee. Once used, a photograph is available to other users for infinite uses over the life of the copyright. The $1,500 figure is an average value based on this reality of multiple uses.[10]

The "sale" that equates most closely to a loss in the stock photo industry is a "buyout", where a user will buy the entire copyright to an image, either for a period of time or for the life of the copyright. These "buyouts" are infrequent because they are quite costly. A typical buyout is many thousands of dollars and even then, photographers are reluctant to grant permission, as it precludes multiple future sales. A loss is akin to a buyout since the photographer no longer has the image in his or her collection to license. The agent representing the

---

[10] PACA notes that one of petitioner's expert witnesses explained in some detail that she appraises photographic images for estates and galleries, such as Sotheby's, Inc. That transparencies are appraised for estates and estate sellers makes clear that transparencies have recurrent use of many years, and their value is not limited to the photographer's early life, as the Second Circuit seemed to say. As a copyright always lasts years longer than its author (see 17 U.S.C. §302(a)), then the Second Circuit's emphasis on the sales history of petitioner's work up to the time of trial was misguided. By discounting the potential earning power of photographs in the future, the Second Circuit took a snapshot in time to find value, which is not how professional photography is valued. Notably, the jury in the present case heard evidence on this point and obviously understood it.

photographer is likewise affected. Obviously, a photographer who has created a body of irreplaceable work over the course of many years suffers a terrible, commercial loss when all of his or her selects are lost.

The necessity for an industry value for professionally edited and professionally taken photographs should be apparent. With stock libraries ranging from hundreds of thousands to millions of images, stock agencies cannot possibly value individual photographs before sending them to a client for review. The figure of $1,500 was always intended to be a fair average of what a photograph can earn over its lifetime. It is understood that some may earn more, and some may earn less. Users also need to know the value so that: (i) they can properly insure the images once they leave the agency's premises; and (ii) use the due care required in handling valuable property belonging to another.

While the valuation of transparencies has always been problematic, as transparencies are not sold outright in the ordinary course of business, but instead, leased on a per use basis, trial courts who see the evidence first hand, in both juries and non-jury cases, have understood the above concepts and made fair and reasonable determinations. As stated by New York Supreme Court Judge Gabel, in *Hoffman*:

> [I]t is apparent that each of the negatives is an income producing asset from which an image may be sold and resold many times over in the future. Some may be sold more than others. Accordingly, the sum of $1,500.00 is a reasonable valuation of each and every missing negative.

III.

THE SECOND CIRCUIT'S INTERPRETATION OF A "UNIQUE" PHOTOGRAPH BEARS NO RELATION TO THE MEANING OF THAT TERM AS UNDERSTOOD BY MEMBERS OF THE STOCK PHOTOGRAPHY INDUSTRY

The Second Circuit misinterpreted the element of "uniqueness" in assigning a value to petitioner's photographs. The Court emphasized this element, along with past earnings, in isolation, and ignored the other *Rattner/Hoffman* elements which formed the charge to the jury. Thus, the Second Circuit's opinion fails to reflect a true understanding of what makes a professional photograph marketable.

Although the Appellate Division in New York has consistently spoken of uniqueness to determine whether an average value of $1,500 was appropriate in a given case, none of these decisions has defined "uniqueness" as it relates to images generally, or to the images at issue in those cases. *MacWeeney, Nierenberg, Blackman, supra.*

This is true of the Second Circuit as well. It determined that many of the photographs were not "unique" because other photographers were present on certain occasions. The basis of the court's reasoning is faulty, as it misunderstands basic principals of professional photography and most seriously, does not reflect the realities of the stock photography market.

In essence, the term "unique", when applied to photographs is a misnomer. By definition, a photograph represents a moment in time that cannot be recreated. Under that definition, most photographs are "unique".

There are certain studio conditions that can sometimes be recreated, as in *MacWeeney*, when photographing objects or models under known lighting conditions. However, with action and location photography, it is impossible to recreate the conditions to come up with identical photographic results, and *a fortiori*, this is true for historical conditions which can never be recreated, such as the civil wars in Central America.

Even if other photographers were present in the same general area, the jury clearly understood that petitioner's photographs satisfied the requirement of uniqueness, on which they were charged. Uniqueness encompasses more than just the broad subject matter. Otherwise, Ansel Adam's "Moonrise, Hernandez, New Mexico" is only an evening western landscape, Margaret Bourke-White's "Ghandi at His Spinning Wheel" is just another photo of a politician, and Phillipe Halsman's "Einstein" is just another headshot of a college professor. Whether a photograph is "unique" or not must also reflect the selective eye of the photographer, his or her technical abilities, and the editing process of a professional photographer in identifying selects to submit to a user or stock agency.

The information a photographer chooses to include in each frame is as important as the information he or she chooses to omit. Likewise, the choice of the information selected, emphasized, or focused upon affects the uniqueness of a photographic image. The varying distance and height between the photographer and the subject creates very distinctive and unique photographs, such as the difference between a close up, a long shot or a high or low angle on a subject. The same is true for depth of field.

The Court need only consider the subject matter of Life Magazine photojournalist, Margaret Bourke-White.[11] Her pictures of assembly lines, buildings and industrial objects were unique, and are considered classic works, albeit many people took pictures of this subject matter at that time. Her industrial photographs pre-dated her later work documenting the suffering of the rural poor during the Depression, the carnage during the partition of India, or the horrors of the Nazi Holocaust, for which she became famous. *See* Silverman, *For the World to See* (Viking 1984). Under the Second Circuit's implied definition of uniqueness, had Ms. Bourke-White's factory photos been lost, they would not be "unique."

Certainly more than one photographer can have valuable photographs of the same subject. If three photographers shoot The French Open at Rolland Garos, all of them should, after editing, have valuable photographs to sell to the various magazines and interested publications. If a photograph meets the elements of technical and aesthetic quality, it has value, despite the fact that others have taken different photographs of the same subject.

This principal is the essence of the stock photography business. Different users have different needs. A stock library must contain a wide breadth of different photographs on a subject to satisfy a client. If a user is interested in a feature on the President's travels, for example, an agency could not simply send one image of the President exiting a helicopter. *Gasperini*, 66 F.3d at 429. A user requires a selection, to suit his or her layout and design concepts. Large amount of sky in a composition may be needed for

---

[11] In the history of photography, Ms. Bourke-White is certainly a photographer of equal stature to Walker Evans or Alfred Eisenstaedt, whose works the Second Circuit panel obviously esteems.

copy or a masthead. A vertical may fit one layout, while a horizontal will be the only solution for another client. An architectural detail will be appropriate in a textbook, while a full view will be featured in a travel brochure.

An illuminating example is a photograph in one PACA member's library of a handshake that has sold to different users more than 300 times and its earnings, even assuming a "low" average of $175, far exceeds the $1,500 many times over. On a "cold paper record" this image would "fail" the uniqueness test. What makes this image unique is the lighting used by the photographer, setting it apart from other handshake images. Judges who did not experience the trial often miss the point that a subject as basic as a handshake has great commercial value because of the concept illustrated, such as the closing of a business deal.

IV.

A BODY OF WORK HAS VALUE GREATER THAN THE VALUE OF INDIVIDUAL TRANSPARENCIES

Recently, appellate courts have overlooked a critical factor in valuing photographs, i.e., the group value of photographs as first set forth in *Rattner* and *Hoffman*. Because damages can be substantial when a body of work is lost, appellate court's are too often quick to characterize larger jury verdicts as a "windfall" or "a winning lottery ticket" for the photographer. In doing so, the appellate courts overlook the commercial magnitude of loosing an entire body of work on a particular subject covering a span of years. This exemplifies the maxim "a whole is greater than the sum of its parts".

The importance of a body of work has long been understood by stock photo agencies. Many member

agencies specialize in areas such as science, nature, music, celebrities, news, travel or even food, in order to build large collections of a particular subject. A body of work can tell a complete story much more than one cover shot in a magazine. Agencies require complete files of a particular subject to fulfill user requests. Commercial uses for bodies of work are increasingly important and will continue to increase in importance in the digital future. Images have the reputation of "speaking a thousand words". A photograph knows no language barrier. A photoencyclopedia of modern history and politics would not be complete, for example, without the recent history of bloodshed in Central America.

Whether used on a CD-ROM, or digitized for the internet or World Wide Web, still images are irreplaceable. There is no substitute for the quality of a still image which reproduces far better than video or film images. One only has to read the newspaper to see that collections of photographs have gained importance and value. One company owed by Microsoft's Chairman, William Gates, recently purchased a member agency, Bettmann, one of the largest and oldest archives of historic and news photographs for a substantial sum. New technology has dramatically increased the future value of a body of work captured in still photography, as more and more collections are being purchased.

What apparently happened in this case, and has happened in others which involved the loss of hundreds of photographs, is that the appellate court in essence penalized the photographer for the size of the collection lost. In cases where only a handful of images are lost, jury awards are almost never reduced as unreasonable. Because users often demand to review hundreds of photographs for a large pictorial project, such as a video, textbook or encyclopedia,

the risk of loss and potential liability increases with the number of images requested. Agencies and the photographers they represent cannot afford to have large collections wiped out without fair compensation.

V.

THE WORK OF A PHOTOJOURNALIST IS AS COMMERCIALLY VALUABLE AS THE WORK OF OTHER PROFESSIONAL PHOTOGRAPHERS

The Second Circuit stated: "for all his skills as a photographer, Gasperini did not earn his living with his camera," and partly on this basis, demeaned the commercial value of his work. *Gasperini*, 66 F.3d at 429. This reveals a basic misunderstanding of the term "professional photographer" as used in the industry. "Professional photographer" includes a variety of photographers with a variety of backgrounds. A photojournalist is one type of specialist among professional photographers. Simply because a photojournalist may be better known to the general public for his words, or even voice, the photographs he takes are just as valuable in a commercial sense. The ability to produce consistently professional quality photographs by a photojournalist becomes inseparable from the written word. A photojournalist such as petitioner is paid by the Christian Science Monitor or CBS because of the entire package of skills he offers. It is often the case that an entire news crew cannot be sent to a foreign location when a story breaks, or into extremely hazardous conditions. Many journalists lead a dual career of photographer and photojournalist. Money earned from photography and money earned from writing can rarely be so neatly separated as the Second Circuit implies. The fact

that respondent requested petitioner's images for its "Conflict in Central America" series is testimony to petitioner's reputation as a professional photographer.

VI.

PAST EARNINGS FROM STOCK SALES IS NOT A RELIABLE INDICATOR OF VALUE

The Second Circuit simply did not understand that earnings from stock photography sales are generally not the most significant portion of most photographers' income in the early stages of their careers. Stock income becomes more significant over the course of a lifetime. A photographer must submit a significant body of work to be considered and accepted by a stock photography agency. It often takes a photographer many years of assignments to build up a body of work, as well as the time to carefully edit and caption the images. This is particularly true of a war correspondent like petitioner.

Past use of a photograph is simply not dispositive of value alone. The bald eagle that adorns the Unites States Postal Service truck and Express Mail envelope was in one PACA member's file unused for over eleven years before being licensed to the Postal Service for this one use for many thousands of dollars. Photographs are income earning assets, and cannot be fairly valued without considering potential future sales. The quality of film currently used will not deteriorate for at least the period of a photographer's copyright. Thus, the figure of $1,500 is both reasonable and in many cases, extremely conservative, when valuing the types of images accepted by a stock agency in its files.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit must be reversed and the jury's determination of damages reinstated in its entirety.

Respectfully submitted,

NANCY E. WOLFF
(Counsel of Record)
Cavallo & Wolff
115 East 57th Street,
Suite 1220
New York, New York 10022
(212) 753-2224

March 1, 1996

APPENDIX

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 14

----------X

ROBERT RATTNER,

Plaintiff, Index No. 15762/84

-against-

GEO MAGAZINE and GRUNER & JAHR AG & CO., **DECISION AFTER TRIAL**

Defendants.

----------X

SHORTER, J.:

This action arises on the deposit of photo transparencies by plaintiff, a professional photographer, with defendant, a user.

Some 10 days after the deposit and in response to a telephone request defendant signed a standard form receipt which among other things provided: 39 original color transparencies of Jerusalem valued @ $2,000.00.

Subsequently and within the terms of the bailment defendant GEO Magazine forwarded the transparencies to its European colleagues Gruner & Jahr AG and they have now been lost in return transit. Plaintiff demands restitution in the amount of $78,000.00 for the loss of 39 transparencies valued @ $2,000.00. Defendant pleads that the amount of $2,000.00 is not truly liquidated damages but rather a penalty bearing no relation to true value.

FINDINGS

After extensive trial, the Court makes the following findings:

1. That the phrase value @ $2,000.00 means having a stated value of $2,000.00 each.

2. That the value of a photo transparency is an abstract concept embracing numerous factors including:

a - technical excellence;

b - the selective eye of the photographer;

c - The established prestige and earning level of the photographer;

d - uniqueness of subject matter;

e - established sales or use prices;

f - to some degree each transparency has an osmotic interaction deriving reflected value from the group.

g - the frequency of acceptance by users.

3. The photographic branch of the industry has unsuccessfully attempted since 1965 to fix the minimum value of lost transparencies at $1,500.00 each.

3a. The prevailing practice of users is to offer $200.00 to $800.00 for lost transparencies.

4. Under the U.S. Copyright Act, a photographer has the exclusive license to use his transparency for life plus 50 years (or approximately 100 years).

5. From assorted evidence before me the loosely predictable gross value of any given single transparency will range from $200.00 to $1,000.00 taking into account all the factors in paragraph #2 above.

6. Plaintiff is an established photographer of 9 years standing who has licensed transparencies at fees ranging from $50.00 to $400.00; and whose gross annual income from photography had ranged up to $15,800 at the time of loss.

CONCLUSIONS OF LAW

A. The sum of $2,000.00 stated in the contract as liquidated damages is in fact a penalty.

B. Defendant is responsible for the loss of the plaintiff's transparencies herein.

C. Plaintiff's damages must be determined in quantum meruit.

DECISION

I find for plaintiff against the defendant in the amount of $39,000.00 ($1,000.00 per transparency) with interest from February 10, 1984.

Dated: February 17, 1987
Signed: Edward J. Shorter, J.S.C.

APPENDIX B

SUPREME COURT: STATE AND COUNTY OF NEW YORK

----------X

ETHAN HOFFMAN,

Plaintiff,

Index No. 19102/85

-v-

PORTOGALLO, INC.

Defendant.

----------X

GABEL, J.:

Trial of this matter without jury was concluded before me on April 24, 1986. After submission of post-trial briefs and upon a consideration of all the evidence, I find plaintiff is entitled to judgment in sum of $486,000.00 against defendant.

Plaintiff is a photojournalist of substantial repute who left numerous rolls of film in custody of defendant for print development. Defendant is a professional photographic service catering to the needs of professional photographers (as opposed to a retail establishment such as a Fotomat store). Upon trial, it was established that when plaintiff demanded return of his negatives, defendant could not explain the whereabouts of some 324 of them. Plaintiff qualifies as his own expert in establishing the value of each negative, and assessed each at $1,500.00. Pursuant to his testimony it is apparent that each of the negatives is an income producing asset from which an image may be sold and resold many times over in the future. Some may be

sold more than others. Accordingly, the sum of $1,500.00 is a reasonable valuation of each and every missing negative.

Numerous factors go into the valuation of each negative, including technical excellence, the selective eye of the photographer, his prestige and earning level, the uniqueness of the subject matter, established sales or use prices, group value of individual images and frequency of acceptance by users. Special emphasis was given in the case at bar to the uniqueness of plaintiff's effort (the subject matter was the sex offender's unit of the Oregon State Prison Hospital), plaintiff's prestige as photo journalist and the frequency with which his work has been published (see *Rattner -v- GEO Magazine*, Supreme Ct., NY CO., NYLJ, 3/16/87 [Shorter, J]).

Defendant as bailee is liable for the full value of the negatives at the time of the conversion (*I.C.C. Metals, Inc. -v- Municipal Warehouse Co.*, 50 NY 2d 657, 431 NYS 2d 372) and it is of no consequence that defendant cannot explain what happened to the missing negatives.

There is no issue of validity of disclaimer in this case, as there is no evidence that plaintiff was given notice of defendants purported disclaimer (*Willard Van Dyke Productions, Inc. -v- Eastman Kodak Co.*, 12 NY 2d 301, 239 NYS 2d 337). In any event, it is well established that the law looks with disfavor upon purported disclaimers from one's own negligence., and the unexplained absence of plaintiff's negatives is itself sufficient for the inference of negligence to be drawn after a bailment. Nothing in the record can be taken as contributory negligence on the part of the plaintiff.

Moreover, defendant's principal witness testified that it

was a service to hold negatives. He knew he was catering to professional photographers, did not have a practice of giving receipts and had to be aware that he was dealing with the income producing assets of professional photographers (as opposed to the "snapshot" efforts of the public at large).

Finally, the testimony of defendant's other expert witness, Mr. Harry Amdur, to the effect that the disclaimer is industry wide, absolutely necessary and that the industry does not accept the $1,500.00 per negative standard for professional photographers is without value in the case at bar. Each such case must stand on its own facts due to the variables involved. Whether or not a given disclaimer is sufficient, for example, and whether it was brought home to a given photographer in a case such as this are issues which must be resolved in every similar case. One photographer's reputation might not be as well established as another's, or the income producing power of a photographer will vary, perhaps greatly from those of his colleagues (see *Rattner*, supra). There is, as yet, precious little law on these and related points (see, for example, 6 ALR 4th 931).

Settle judgment.
Dated: June 26, 1987

_____
Hortence Gabel, J.S.C.